REME COURT, U. S.

No. 1161

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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Plaintiff-Respondent,

against

LEO CARLINO,

Defendant-Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JAMES E. BIRDSALL,
Counsel for Petitioner,
11 Broadway,
New York, New York 10004.

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The petitioner prays that a writ of certiorari issue to review an order of the United States Court of Appeals entered on July 25, 1968, as modified by an order of that Court on rehearing dated October 18, 1968.

Citations to Opinion and Judgment Below

The opinion of the District Court printed in Appendix B hereto, *infra*, page 16 is reported at 279 F. Supp. 295. The report of the United States Court of Appeals printed in Appendix B hereto, *infra*, page 25 is reported at 400 F. 2d 56. The order of the United States Court of Appeals dated October 18, 1968 granting a rehearing printed in Appendix B hereto, *infra*, page 29 is unreported.

Jurisdiction

The order granting rehearing, modifying the original opinion dated July 25, 1968 and affirming the order of the District Court is dated October 18, 1968. The case involves an application for a writ of error *coram nobis* which is civil in nature.

By order dated January 25, 1969, Mr. Justice Harlan extended the petitioner's time to file a petition for a writ of certiorari in this case up to and including March 20, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

The Questions Presented

The following questions are presented:

A. Is a petitioner for a writ of error *coram nobis* under 28 U.S.C. 1651 (a) who states under oath that he although innocent was induced to plead guilty to a Federal crime on the understanding that an indictment against his son, who was also innocent, would be dropped, entitled to at least a hearing on his petititon where there are issues of fact involving the circumstances under which he pleaded guilty and a flat contradiction between the reason the Government gave for dismissing the case against the son and the actual record.

The Court below held that under 28 U.S.C. 1651 (a) his application for the writ could be denied without a hearing.

B. Does the fact that the Government keeps its promise of leniency for the son by which it induced the father, the petitioner here, although innocent, to plead guilty bar the father as a matter of law from even a hearing on his petition, although a change in the tax law, neither foreseen nor foreseeable at the time of the coerced plea now

subjects not only the father but the mother to an additional penalty in the form of an enormous tax assessment without any opportunity to defend.

The Courts below held that, even if the father was innocent and pleaded guilty only to protect his son, he could obtain no relief as a matter of law if the promise made by the Government was in fact kept regardless of the unforeseen consequences of the coerced guilty plea.

There is necessarily involved in the above issues the question as to whether the petitioner in being induced to plead guilty to a crime of which he is innocent was denied due process of law guaranteed under the Fifth Amendment to the Constitution, and his right to trial by jury under the Sixth Amendment to the Constitution.

There is also necessarily involved the question of the standards to be applied by the district courts in granting or denying hearings under 28 U.S.C. 1651(a), a question not previously passed upon by this court. This Court granted certiorari for the purpose of passing on precisely the same question under 28 U.S.C. 2255 (*Walker* v. *Johnson*, 312 U. S. 275).

Statutes Involved

The decisions below involved the interpretation of 28 U.S.C. 1651(a), the so called "All Writs Statute". The statute is printed in Appendix A, *infra*, page 15.

Statement

The petitioner pursuant to the provisions of 28 U.S.C. 1651(a) filed an application with the United States District Court for the Southern District for a writ of error *coram nobis* to set aside a judgment of conviction entered on his plea of guilty to one count charging him with income tax evasion (*U. S.* v. *Morgan*, 346 U. S. 502).

The petitioner's application (R. 2ff) stated in substance the following: He was 70 years old with a limited command of English. He has been indicted for filing fraudulent income tax returns. His son was also indicted for the same alleged reason but in a separate indictment. The father, although not guilty, changed his plea of not guilty to guilty to one count of the indictment against him on the understanding with the government that the indictment against his son, who was also not guilty, would be dismissed, thus avoiding any possibility of his son being convicted. At the time he changed his plea and agreed to plead guilty to one count, he was advised by his counsel that in the event tax proceedings were begun against him he could litigate the question of his innocence in the Tax Court. Concededly, that was the law at the time the petitioner entered his plea (Appendix B, p. 27, footnote 1). On his plea of guilty, although he had never been indicted or convicted of any previous offence, he was sentenced to pay a fine and to serve a year and a day in prison. He has served his sentence. Subsequently, the indictment against his son was *nolle prossed.*

The Government in filing its *nolle prosequi* as to the son stated as a reason for dismissing the indictment that the son had submitted an affidavit stating that he had transferred to his father, the petitioner, all the monies involved in the proceedings (Appendix B, p. 20).

After the petitioner had served his sentence, the Internal Revenue Service commenced proceedings against him. In the interim, between the time he entered his plea in 1963, and the commencement of the tax litigation, the Tax Court adopted the doctrine of collateral estoppel which precludes a defendant who has pleaded guilty from litigating the question of fraud in the Tax Court (Appendix B, p. 27, footnote 1).

As a result of this change in the law, the petitioner and his wife who are now 70 are faced with an over-

whelming tax assessment without being even afforded the opportunity of litigating the question of fraud in the Tax Court. It is the petitioner's position that he was not guilty of any offence, that he pleaded guilty to save his son, and if afforded the opportunity, he could establish his innocence. He contends that he fulfilled his part of the agreement by pleading guilty and serving his sentence and seeks relief now only to avoid a crushing penalty in the form of a tax assessment which would ruin both him and his wife and which because of the change in law he cannot even contest.

As a result of the change of law in the Tax Court, the petitioner's only recourse was to appeal to the District Court in an effort to set aside his plea of guilty so that he would be afforded his day in the Tax Court.

The case came on before Judge Wyatt. Judge Wyatt denied the application without a hearing. The allegations in the petition and the answering affidavits and the documentary evidence before Judge Wyatt raised sharp questions of fact. The petitioner swore in his petition that he had pleaded guilty because of the understanding referred to above. No affidavit was put in by the United States Attorney in charge of this case denying this. There were two letters, one written by the counsel for the petitioner to the United States Attorney referring to the understanding and the other denying any such agreement from the United States Attorney (Appendix B, p. 17).

However, all the provisions in the letter from the counsel for the petitioner were carried out, including the dismissal of the charges against the son.

When the petitioner came before Judge Cannella to change his plea to guilty, he first refused to admit his guilt. When asked specifically whether he was guilty of fraud, he denied it (R. 60).

"By the Court:

Q. Mr. Carlino, I presume you speak English? A. Yes, sir.

Q. Because I haven't heard a word from you yet and I just want to know whether you do or you don't. Now, this charge against you, you realize is a criminal charge don't you? A. Yes, sir.

Q. And you have discussed this case with your lawyer? A. Yes, sir.

Q. Now what I understand happened here is that you filed a joint return when you knew it was a false return; is that what you did? A. (No answer.)

Q. I am not going to take a plea from you if you yourself don't know what you are pleading to. What are you pleading to here? A. Well, I pleading whatever this supposed to be.

Q. That I don't take; I don't take 'whatever' pleas. That means nothing to me. I want to know what you did here. Did you file a tax return and was it false at the time? A. Well, we had accountant do the return.

Q. The accountant did the return but did you know that the tax return was false when you signed it? *A. I didn't know.* (Italics supplied)

Q. *Then you are not guilty of it.* I am not going to take a plea from you. You sit down and talk it over with your lawyer. I am going to ask you some questions on this. (Italics supplied)

The Court: Take the indictment. I will call it again. I am not going to take a plea from him unless he tells me he is really guilty of the crime." (Appendix B, p. 18.)

An interesting question, although collateral on this appeal arises as to whether under R. 11 of the Criminal Rules, the procedure followed by Judge Cannella was proper. It was only after a recess that he returned and

admitted his guilt and stated that he had received no promise (Appendix B, p. 19).

It certainly can at least be inferred from the above that his actions after the recess arose from an explanation to him that his plea of guilty must be accepted if his son was to go free.

After reviewing the record, Judge Wyatt denied the application holding that a hearing was not necessary. On appeal to the United States Court of Appeals for the Second Circuit, that Court affirmed the order of Judge Wyatt giving as a reason for its refusal to afford the petitioner a hearing the following (Appendix B, p. 27):

> "At the time of sentencing, the remaining counts of the indictment against appellant were dismissed. Subsequently, upon submission of an affidavit by Frank Carlino stating his father was the true recipient of the income not reported on Frank's tax return, the government dismissed the case against appellant's son."

The affidavit in question was, of course, in the possession of the government who had not submitted it. The petitioner thereupon moved for an order directing that the affidavit of the son be made part of the record and that a rehearing be granted. The United States Court of Appeals granted the application for the sole purpose of having the government present the affidavit in question. The government failed to do so until specifically ordered by the Court. The affidavit was thereupon filed. Far from stating that the son had transferred any monies to his father, the affidavit flatly denied that any money in fact was given to his father by him.

In his affidavit dated November 6, 1963, the day before his father pleaded guilty, the son said (R. 152):

> 10. "I gave the $50.00 to Buffa. However, when I offered the $50.00 to my father, Leo Carlino, *he*

> *declined to accept it.* He said that he wanted me to have it since he knew that the amount of money I was spending for the corporation was in excess of the amounts that I was receiving. I always gave the moneys in question directly to Mr. Buffa in cash in an envelope. On a number of occasions after my father's first refusal I again offered him the moneys *but he always told me to keep it and to use it for the business.*" (Italics supplied)

Thus the reason given by the government in the *nolle prosequi* for dismissing its case against the son, and the reason given by the Court of Appeals for denying the petitioner even a hearing on his allegations were completely disposed of. Since the government's explanation for why it dismissed the case against the son was destroyed, a strong inference arises that its real reason was because of the understanding reached with the petitioner.

The Court of Appeals thereupon granted a rehearing, modified its opinion by striking out the erroneous statement, but nevertheless once again affirmed Judge Wyatt's order denying the petitioner even a hearing on his allegations (Appendix B, p. 29).

To summarize, the petitioner in support of his right to a hearing has (a) his own sworn allegations that he was innocent and pleaded guilty only because of the understanding with the Government that his son would be freed from the possibility of criminal proceedings, (b) no sworn statement denying petitioner's allegations, (c) the letter from his attorney to the Government before he entered his plea setting forth specifically the understanding in question, (d) the fact that when his change of plea was entered he first categorically denied his guilt and only admitted it after a recess, and (e) the fact that the government stated that it dismissed the case against the son only because the son signed an affidavit stating that he had

turned over all the money to his father when in fact the son's affidavit dated November 6, 1963, the day before his father changed his plea stated precisely the opposite, raising the inference that the real reason was the agreement with the petitioner.

In addition, there are two other facts: first, the petitioner has served his sentence, thus fulfilling his agreement with the Government, and second, the change in the decisional law in the Tax Court now denies the petitioner even a hearing in that Court and condemns the petitioner and his wife, who are both over 70 years old, to a tax assessment that will bankrupt them.

Reasons for Granting the Writ

A. With reference to the denial of the petition without a hearing.

In *United States* v. *Morgan,* 346 U. S. 502, this Court held that, under circumstances similar to those in the instant case, a petitioner who has served his sentence under a plea of guilty and was no longer in custody may obtain a writ of error *coram nobis* under 28 U.S.C. 1651 (a) to review and set aside a judgment of conviction. That decision laid down no standards to determine under what circumstances an application for the writ could be denied without a hearing and under what circumstances a hearing was required. In *Walker* v. *Johnson,* 312 U. S. 275, this Court granted certiorari for the purpose of determining similar standards to be applied on a petition for a writ of habeas corpus under 28 U.S.C. 2255.

In a series of cases following the *Morgan* case the various Courts of Appeal and particularly the Court of Appeals for the Second Circuit adopted the rule laid down in *Walker* v. *Johnson* that a hearing was also required under 28 U.S.C. 1651(a) unless the allegations in the petition were

clearly frivolous and had absolutely no support in the record. In *United States* v. *Capsopa,* 260 F. 2d 566 (2nd 1958), the petitioner sought to set aside a conviction on the grounds that he was not represented by counsel.

The Government, in answer to the petition, submitted an affidavit of an attorney that he had represented the petitioner at the time he pleaded guilty. The District Court denied a hearing, finding that the petitioner was represented. The Court of Appeals reversed and, speaking through Judge Moore, stated (at p. 568):

> "Had a hearing been held the Court might well have found defendant's testimony to have been a 'naked assertion' but as the record now stands there are two assertions (1) by the appellant that he was not represented by counsel in 1937 and in 1941 and (2) by the government that appellant was actually represented in 1937 and 1941 and it was the practice of the then Trial Judge to advise defendants of their rights and to insist upon representation by counsel. The weight to be attributed to the testimony of the various witnesses can best be determined upon a hearing.
>
> "In final analysis, both appellant and the government should be better satisfied after a hearing. If he fails, appellant will at least know that the courts have endeavored to give him the maximum protection which the Constitution affords."

Again, the Court of Appeals in *U. S.* v. *Tribote,* 297 F. 2d 598 (1961), speaking through Judge Kaufman, reversed an order of the District Court denying a hearing on a fact situation less in dispute than that existing in the instant case, stating (at p. 603):

> "There is an understandable tendency to try to avoid hearings in coram nobis and habeas corpus proceedings where it appears that there is little merit

in the petition, and that hearing might well be of no avail to the petitioner. With the crowded dockets and delay caused by a heavy judicial workload, a diligent judge, out of concern for our goal of speedy justice, may well overlook the fact that a particular application alleges sufficient particulars to require a hearing. Our concern for efficiency must not outweigh our concern for individual rights. We cannot refuse a hearing because hearings generally show that there is no real basis for relief, or even because it is improbable that a prisoner can prove his claims. See *U. S. ex rel. Marcial* v. *Fay,* 247 F. 2d 669 (2nd Cir., 1957), cert. denied 355 U. S. 915, 78 S. Ct. 342, 2 L. Ed. 2d 274 (1958). Once we embark upon shortcuts by creating a category of the 'obviously guilty' whose rights are denied, we run the risk that the circle of the unprotected will grow."

Finally, in the recent case of the *U. S.* v. *Keogh,* although the issue was an extremely narrow one and it had been passed upon by the Trial Judge, who was thoroughly acquainted with the entire record, the Court of Appeals on an appeal from a denial of an application for a writ of error *coram nobis* without a hearing reversed and remanded the matter for a hearing. (*U. S.* v. *Keogh,* 391 F. 2d 138 [2nd Cir.], February 12, 1968.)

If Justice Keogh, who was convicted after a full trial with a careful review by the Court of Appeals, passed "the rather low threshold entitling him to an evidentiary hearing" (at p. 142) then certainly Mr. Carlino, the petitioner here who never had a trial, who claims that he was not guilty and only pleaded to save his son, has passed the same low threshold.

Concededly, it is impossible to reconcile the decisions in the above quoted cases with the holding in the instant case.

It would appear that the decision in the instant case was influenced by what the Courts below believed was the holding of the United States Court of Appeals for the Ninth Circuit in *Cortez* v. *United States,* 337 F. 2d 699, which both it and the District Court cited in support of their denial of a hearing.

The Courts below apparently interpreted that case as standing for the principle that a person who is induced to plead guilty by a governmental promise or threat to a relative may be denied relief without the necessity of a hearing. Interestingly enough, subsequent to its decision in the *Cortez* case, the United States Court of Appeals for the Ninth Circuit specifically rejected that interpretation.

In *Johnson* v. *Wilson,* 371 F. 2d 911 (9th 1967), the District Court in the Ninth Circuit had denied an application for a writ without a hearing. Like the Court of Appeals for the Second Circuit, in the instant case, the District Court based its decision on the grounds that *Cortez* permitted such disposition. The Court of Appeals, however, reversed, stating (at 912):

> "The Trial Court read *Cortez* v. *United States,* 337 F. 2d 699 (9th Cir., 1964), as holding that police threats or promises respecting members of an accused's family cannot invalidate a guilty plea. *Cortez* stands for no such general principle. In that case, the Trial Court, after a full evidentiary hearing, had made a factual finding that the accused's plea of guilty was neither coerced nor induced by the alleged threats or promises. We affirmed, holding only that on the whole record this factual determination was not clearly erroneous."

It is thus clear that the decision of the United States Court of Appeals for the Ninth Circuit in the *Johnson* case is

directly opposed to the decision of the United States Court of Appeals for the Second Circuit in the instant case.

In view of this conflict, it is important for this Court to determine the proper standards to be followed by the District Courts in passing on applications for writs under 28 U.S.C. 1651 (a).

B. With reference to the holding that an innocent party who is coerced into pleading guilty by a governmental promise cannot attack the plea if the promise is kept.

In its opinion denying the petitioner a hearing, the Court of Appeals made the following statement (Appendix B, p. 28):

> "In any event, even if the claimed understanding did exist [i.e. that the petitioner, though innocent pleaded guilty to save his son], appellant neither misconstrued its terms nor misunderstood its immediate consequences. The understanding allegedly was fully performed exactly as appellant expected. Its mere existence would no way vitiate his otherwise knowing and voluntary plea. *Cortez* v. *United States,* 37 F. 2d 699 (9th Circ. 1964) . . ."

As has been pointed out above, the Court of Appeals for the Second Circuit in making this statement misconstrued the holding in the *Cortez* case as had Judge Wyatt.

If such a holding were in fact the law, both the state and federal government could with impunity coerce an innocent man into pleading guilty by a promise not to prosecute his wife or other close relative so long as the promise was kept. In the hands of an unscrupulous federal or state prosecutor such a holding would provide a swift and effective method for inducing a defendant to plead guilty. For it is a fact of human nature that many men, whether innocent or guilty, when charged with a criminal offense

can be induced to waive their constitutional right to trial by jury and plead guilty on a promise that the government will take no steps against their wives or children. Indeed, aside from physical torture, it is hard to conceive a more effective form of coercion (*Pennsylvania* v. *Claudy*, 350 U. S. 116, at 118).

The above quoted statement, however, does not represent the law.

In *Shelton* v. *United States*, 356 U. S. 26, the government with this Court's consent conceded that a promise of a specific sentence which the defendant in fact received together with an agreement to drop other charges which was done was sufficient to raise the question as to whether the plea of guilty was in fact coerced. In that case every promise made was meticulously kept. (Cf. *Machibroda* v. *U. S.*, 368 U. S. 487, at 493, where this Court cited *Shelton* on the question of coerced pleas.)

Both the governmental position in that case, and this Court's holding directly contradict the holding of the United States Court of Appeals for the Second Circuit quoted above. In view of the contradiction between that holding and both the governmental position and this Court's holding in the *Shelton* case, a writ of certiorari should issue.

Conclusion

Because two Courts of Appeals have reached contrary results and the decision involves an important question as to when a hearing is required under the "All Writs Statute", this petition for a writ of certiorari should be granted (*U. S.* v. *Muniz*, 374 U. S. 150).

In addition, in the exercise of this Court's power to supervise the judicial enforcement of federal criminal law it should issue the writ to review the doctrine enunciated

below that an innocent defendant coerced into pleading guilty by a promise of leniency to a relative is without a remedy as a matter of law if the promise which induced the coerced plea is kept regardless of the unforeseen and unforeseeable consequences that subsequently flow from the guilty plea.

Respectfully submitted,

JAMES E. BIRDSALL,
Counsel for the Petitioner.

APPENDIX A

Title 28 U.S.C. 1651—Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

APPENDIX B

Order and Opinion by Wyatt, D. J., Denying Motion for a Writ of Error *Coram Nobis.*

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,

Respondent,

against

LEO CARLINO,

Petitioner.

Appearances:

Robert M. Morgenthau, Esq., United States Attorney, Attorney for the United States of America.

Elkan Abramowitz, Esq., Assistant United States Attorney, Of Counsel.

Warner & Birdsall, Esqs., Attorneys for Defendant Leo Carlino, 11 Broadway, New York, New York 10004.

James E. Birdsall, Esq., Of Counsel.

WYATT, District Judge,

This is a motion in the nature of a writ of error *coram nobis* (28 U.S.C. § 1651[a] for an order setting aside a judgment of this Court of conviction of Leo Carlino ("movant") and Miss Smart Frocks, Inc. (the "corporation"), a New York corporation of which movant was an officer, director and stockholder. The judgment was entered on December 9, 1963 after pleas of guilty by movant and by the corporation.

An indictment (62 Cr. 349) was returned on April 11, 1962 charging the corporation, the movant and Herbert Klein with conspiracy and with the substantive offenses

of attempted income tax evasion or filing false income tax returns or both. Some of the twenty counts charged movant alone, some Klein alone, and some charged all three defendants jointly.

On the same day—April 11, 1962—an indictment (62 Cr. 348) was returned naming as defendants Frank Carlino (son of movant), Malcolm B. Klein (son of Herman Klein), and Lady Smart, Inc., a corporation. There were nineteen counts charging the defendants with conspiracy and with substantive offenses of attempted income tax evasion.

On May 7, 1962, all defendants in both indictments pleaded not guilty.

Evidently counsel for movant had been discussing a plea of guilty in 62 Cr. 349 with the Assistant United States Attorney in charge (the "Assistant"). As to 62 Cr. 348, proposed affidavits had been submitted to the Assistant which would show, as set out in a letter of September 3, 1963 from counsel for movant to the Assistant "that these individuals (Frank Carlino and Malcolm B. Klein) * * * are not guilty of the violations of the income tax statute charged in 62 Cr. 348." The cited letter stated that an "agreement" had been reached, the first part of which was said to be that the government would dismiss 62 Cr. 348 "upon presentation of affidavits in the form previously submitted duly executed by Frank Carlino and Malcolm B. Klein establishing that Lady Smart, Inc. and they are innocent of the charges brought against them in that indictment." The last part of the "agreement" was said to be that movant and the corporation would plead guilty to count 16 of the indictment (62 Cr. 349), that all other counts would be dismissed, that counsel for movant would be free to urge maximum leniency, and that the United States Attorney would make no recommendation. In reply, under date of September 16, 1963, the Assistant flatly denied any "agreement". Specifically as to 62 Cr. 348, the Assistant wrote that

"competent and convincing evidence with respect to any defendant's innocence will be carefully considered by the Government before proceeding to trial".

On November 7, 1963, movant, before Judge Cannella with counsel, withdrew his plea of not guilty to count 2 of 62 Cr. 349 and pleaded guilty to that count. Count 2 charged that movant attempted to evade income tax due for the calendar year 1955 by filing a false income tax return for that year in violation of Int. Rev. Code of 1954, § 7201. At the same time, the corporation through its counsel (authorized thereto by the directors) pleaded guilty to count 16 of 62 Cr. 349. Count 16 charged that the corporation, the movant and Herman Klein attempted to evade income tax due from the corporation for the fiscal year ending January 27, 1956 by filing a false income tax return for the corporation for that year, in violation of Int. Rev. Code of 1954, § 7201.

Before accepting movant's guilty plea, Judge Cannella questioned him; at first, the Judge was not certain as to the answers of movant and adjourned the plea for a period of time, declaring that he would not accept the plea from movant "unless he tells me he is really guilty of the crime". Later on the same day, Judge Cannella questioned the movant again. The transcript shows the following questions and answers, among others:

"By the Court:

Q. All right, let's start all over again, Mr. Carlino; you want to plead guilty and you have entered such a plea, which I am not too sure I am going to take yet, but I want to find out what you know about it. You are pleading guilty to a charge which says that you violated the Internal Revenue Laws. It says here that on April 14 you filed a return which in effect was a false return for the calendar year 1955, and you filed a joint return at that time on behalf of yourself and your wife, and at that time you said

that the taxable income for that year was $54,000 in round figures, and the tax due on that was $22,000, whereas the fact of the matter was that the income was about $70,000 and the tax was about $32,000.

Did you file such a return? A. Yes, sir.

Q. And you knew at the time that you were in effect understating your income by about $25,000? A. Yes.

Q. You did know that? A. Yes, sir.

Q. It was prepared by an accountant for you and then you signed it; is that it? A. Yes, sir.

Q. There is no question in your mind that you knew that this return was a false return when you filed it? A. No, sir.

Q. There is not? A. No, sir."

Judge Cannella was also assured by movant on the record that no promises had been made to movant by anyone.

Judge Cannella accepted the pleas of guilty of movant and of the corporation (Fed. R. Crim., p. 11).

Thereafter, on December 9, 1963, a sentence of imprisonment of a year and a day and a fine of $5,000 was imposed on movant, which sentence has been served and paid. Sentence of a fine of $10,000 was imposed on the corporation and has been paid. The remaining counts in indictment 62 Cr. 349 naming movant and the corporation were dismissed on their motion, without objection by the government.

On March 12, 1964, Herbert Klein pleaded guilty to count 9 of 62 Cr. 349 and was sentenced the same day.

On March 19, 1964, Lady Smart, Inc. pleaded *nolo contendere* to indictment 62 Cr. 348 and was fined $4,000.

On April 22, 1964, the United States Attorney filed a dismissal ("*nolle prosequi*") of indictment 62 Cr. 348 against Frank Carlino and Malcolm B. Klein and leave of Court was granted the same day (Fed. R. Crim., p. 48[a]). The reason given in the dismissal for its filing

was that affidavits had been submitted by Frank Carlino and Malcolm B. Klein "alleging the transfer to their fathers of substantially all the moneys with which they were charged in this indictment (62 Cr. 348)". By this time the fathers had pleaded guilty and had been sentenced.

On October 21, 1964, a divided Tax Court, apparently departing from earlier decisions, held that convictions, whether on plea of guilty or not, of a violation of Int. Rev. Code of 1954, § 7201 precluded a taxpayer from denying underpayment of tax for the year or years involved or that part of such underpayment was due to fraud (Int. Rev. Code of 1954, § 6653[b]). *John W. Amos,* 43 T. C. 50; *Arctic Ice Cream Co.,* 43 T. C. 68.

In 1966, the Commissioner of Internal Revenue gave notice to movant and the corporation of an income tax deficiency and a fraud penalty for the year 1955. Petitions to the Tax Court followed (Int. Rev. Code of 1954, § 6213 [a]).

In the Tax Court, movant and the corporation are faced by the collateral estoppel effect of their guilty pleas as to the year 1955 (movant) and the fiscal year ending January 27, 1956. The present motion has been made, therefore, with the avowed object of removing the effect of the guilty pleas in the Tax Court so that the issue of fraud could be contested there for the years indicated. Should relief be granted, presumably a not guilty plea would be entered as to the counts involved and they would then be tried in this Court. Should such a trial result in convictions, there would again be a collateral estoppel in the Tax Court. *John W. Amos,* above.

The present motion is procedurally proper to test the guilty pleas entered in 1936, *United States* v. *Morgan,* 346 U. S. 502 (1954); see *United States* v. *Keogh,* —— F. 2d —— (2d Cir. February 2, 1968).

There are enough facts which are undisputed to require that this motion be denied. No hearing is necessary.

The issue is solely whether the pleas of guilty were "voluntary". *Machibroda* v. *United States,* 368 U. S. 487, 493 (1962); Fed. R. Crim. P. 11.

As for the corporation, there is no showing that a motion in its behalf has been authorized. The notice of motion is signed by counsel for Leo Carlino (the movant) only. It is not shown that movant is presently an officer or director of the corporation. The record shows that the plea of guilty was entered by the corporation through counsel, "authorized by the directors" so to do. There is no affidavit by counsel or by any director to show that the plea by the corporation was not voluntary.

As for the movant, he first contends that if a "promise" induces a plea of guilty the plea is not voluntary, whether or not the "promise" is carried out.

Assuming that this contention is correct, there is no showing for movant that there was any "promise". His affidavit is only that his counsel advised him at the time that the United States Attorney had "indicated" that if movant pleaded guilty to one count, the government would dismiss other counts and would dismiss all counts in the separate indictment against movant's son and others; movant does not say that the United States Attorney dealt with him; rather it appears that the only dealings were with movant's counsel and there is no affidavit from counsel as to what, if anything, counsel told movant. The correspondence before the plea contains a written denial by the Assistant that there was any "agreement". The record shows that dismissal of the charges in the separate indictment against movant's son was considered and effected on a showing by affidavit of the innocence of the defendants named in that indictment, and not on any plea of guilty by movant. Finally, Judge Cannella, before accepting his plea of guilty, asked movant whether "any promise" had been made to him "by anyone, either your lawyer or the District Attorney?" Movant answered: "No, sir". He will not now be heard to say that this answer relied on by the judge, was false.

In this connection, it is significant that for over four years after the plea of guilty was entered, movant made no claim that it was induced by promises and was involuntary.

But suppose that there was a promise, as movant contends. It is plain and is conceded that the promise was fully carried out. All other counts in 62 Cr. 349 were dismissed and all counts in 62 Cr. 348 against movant's son and others were dismissed. It would be a travesty of justice if, after receiving the benefits of dismissal of all other counts in 62 Cr. 349 and of all counts in 62 Cr. 348—as to which the statute of limitations would preclude prosecution now—movant were permitted to set aside his plea of guilty. No authority has been cited, and none has been found, for the proposition that an agreement for a plea of guilty renders the plea involuntary as a matter of law and without regard to the fairness of the transaction. There is authority to the contrary. *Cortez* v. *United States,* 337 F. 2d 699 (9th Cir. 1964), cert. denied, 381 U. S. 953 (1965); *United States* v. *Cariola,* 323 F. 2d VRJ (3d Cir. 1963); *Kent* v. *United States,* 272 F. 2d 795 (1st Cir. 1959); *Martn* v. *United States,* 256 F. 3d 345 (5th Cir.), cert. denied, 358 U. S. 921 (1958); *Shelton* v. *United States,* 246 F. 2d 571, 572 n.2 (5th Cir. 1957) (*en banc* majority), rev'd on confession of error, 356 U. S. 26 (1958); American Bar Ass'n Project on Minimum Standards for Criminal Justice, Pleas of Guilt (1967); Note, 112 U. Pa. L.R. 865 (1964).

Movant cites *United States* v. *Mancusi,* 275 F. Supp. 506 (E.D.N.Y. 1967) and *United States* v. *Gilligan,* 256 F. Supp. 244 (S.D.N.Y. 1966). These are cases where alleged promises with respect to sentence were not kept. They have no application to this situation where, accepting the claims of movant, he got exactly the benefits he expected.

The other contentions for movant are without merit. He contends that on advice of his counsel, he believed that

the guilty plea would not prevent him from litigating the issue of fraud in the Tax Court. At the time, this advice appears to have been correct. *Meyer J. Safra,* 30 T.C. 1026 (1958). It was nearly a year later that the Tax Court changed the rule. Surely the validity of guilty pleas cannot be affected by subsequent changes in the law from that correctly understood by the defendant at the time of plea. Indeed, even if counsel's advice had been wrong at the time given, it related to a "collateral consequence of conviction" and would not affect the voluntary character of the plea. *United States* v. *Parrino,* 212 F. 2d 919 (2d Cir.) cert. denied, 348 U. S. 840 (1954). The language used by the Court in *Parrino* is particularly apt here (212 F. 2d at 922):

> "Doubtless there may frequently arise tax evasion cases in which after conviction on a plea of guilty the defendant is unpleasantly surprised when, confronted with a civil action for the recovery of evaded taxes, he finds a defense foreclosed by his plea in the criminal cases * * * We think it plainly unsound to hold * * * that such defendants are subject to manifest injustice, if held to their plea, merely because they do not understand or foresee such collateral consequences. We find no case which even looks in that direction * * *."

Movant also says that he did not realize that conviction on his plea of guilty would deprive him of the right to vote in New York. Assuming this to be true, it is another collateral consequence, ignorance of which does not affect the voluntary character of a plea of guilty. The Third Circuit Court of Appeals, in *United States* v. *Cariola,* 323 F. 2d 180, 186 (1963) said:

> "To hold that no valid sentence of conviction can be entered under a plea of guilty unless the defendant is first apprised of all collateral legal consequences of the conviction would result in a mass exodus from

the federal penitentiaries. The collateral effect of a federal conviction varies, depending upon the offense, and whether state or federal law is involved. State laws are far from uniform. The effect of a conviction as an admission in a later civil action, upon the credibility of the defendant as a witness, his right to vote, his qualification to hold office, its sentencing significance under 'second offender' laws, and its deportation relevance in the case of aliens, are but a few of the areas in which a federal conviction can have important collateral legal significance.

"Despite the breadth and frequency of the judicial statements that a defendant cannot be held to a plea of guilty which is made without an understanding of its consequences, the factual situations which have occasioned the statements afford no basis for holding that the finality of a conviction depends upon a contemporaneous realization by the defendant of the collateral consequences of his plea."

Finally, it should be noted that Judge Cannella made a meaningful and painstaking inquiry into the facts. In response to specific questions, movant stated that he filed a return for 1955, that he understated income by about $25,000 and that he knew the return was false when he filed it. The record establishes that the plea of guilty was made because movant believed himself guilty and that the plea was "made voluntarily" (Fred R. Crim. P. 11).

The motion is denied.

So Ordered.

Dated: New York, New York, February 9, 1968.

INZER B. WYATT,
United States District Judge.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

No. 510—September Term, 1967.

(Argued June 5, 1968 Decided July 25, 1968.)

DOCKET No. 32216

UNITED STATES OF AMERICA,

Respondent-Appellee,

vs.

LEO CARLINO,

Petitioner-Appellant.

Before: WATERMAN and FEINBERG, Circuit Judges and ZAMPANO, District Judge.*

Appeal from an order of the United States District Court for the Southern District of New York, Inzer B. Wyatt, J., denying a petition for a writ of error *coram nobis* without an evidentiary hearing. Affirmed.

JAMES E. BIRDSALL, New York, N. Y. (Warner & Birdsall, on the brief), for Petitioner-Appellant.

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* Of the District of Connecticut, sitting by designation.

ELKAN ABRAMOWITZ, Assistant United States Attorney, New York, N. Y. (Robert M. Morgenthau, United States Attorney for the Southern District of New York, N. Y., Pierre N. Leval, Assistant United States Attorney, New York, N. Y., on the brief), for Respondent-Appellee.

ZAMPANO, District Judge:

The appellant, Leo Carlino, was sentenced in 1963 to imprisonment for one year and fined $5000 under a judgment of conviction entered in the United States District Court for the Southern District of New York, Cannella, J., following his plea of guilty to one count of income tax evasion. Four years later, having served his sentence and paid his fine, Carlino applied for a writ of error *coram nobis* alleging his guilty plea was involuntarily made. After oral argument, Judge Wyatt denied Carlino's petition without an evidentiary hearing. Carlino now appeals from that decision. We affirm.

On April 11, 1962, the appellant and others were charged with conspiracy and with various substantive offenses of income tax evasion in a 20 count indictment. On the same day appellant's son, Frank Carlino, and others were similarly charged in a separate indictment. On May 7, 1962, the defendants named in both indictments pleaded not guilty. Plea negotiations during the following year culminated in a representation by the government that upon appellant's guilty plea to one count of the indictment, the government would at the time of sentencing "make a determination with respect to the remaining counts" against him. In addition, the government agreed "to carefully consider" the case against Frank Carlino before proceeding to trial.

On November 7, 1963, the appellant withdrew his plea of not guilty to count two of the indictment and pleaded guilty to attempted income tax evasion by filing a false

return for the calendar year 1955. Before accepting appellant's change of plea, Judge Cannella carefully examined the circumstances under which it was tendered and, among other things, elicited express statements from appellant that he had knowingly understated his income for the year 1955 by $25,000, that he had knowingly filed a false return, that no one had threatened or coerced him to change his plea, and that no one had promised him anything in exchange for his plea.

At the time of sentencing, the remaining counts of the indictment against appellant were dismissed. Subsequently, upon submission of an affidavit by Frank Carlino stating his father was the true recipient of the income not reported on Frank's tax return, the government dismissed the case against appellant's son.

In 1966 the Commissioner of Internal Revenue notified the appellant of an income tax deficiency and fraud penalty assessment for the year 1955. Appellant sought relief in the Tax Court, but learned, apparently for the first time, that he was collaterally estopped from contesting the fraud penalty by virtue of his guilty plea.[1] As a result, in order to avoid this obstacle to his petition in the Tax Court, the appellant moved in the court below to set his guilty plea aside, claiming it was involuntary because induced by an "understanding" with the government that, if he pleaded guilty to one count, all charges against his son would be dismissed.

---

[1] It is undisputed that appellant was unpleasantly surprised and understandably disturbed when he learned his guilty plea prevented him from litigating the issue of fraud in the Tax Court. Prior to his change of plea, appellant's counsel had properly advised him that his conviction would be no bar, if the government instituted subsequent civil proceedings. However, in 1964, some two years after appellant pleaded guilty, the Tax Court changed its position and adopted the collateral estoppel rule See *John T. Amos,* 43 T. C. 50, aff'd, 360 F. 2d 358 (4 Cir. 1965). In any event, such an unforeseen "collateral consequence" of conviction would not affect the voluntary character of appellant's guilty plea. *United States* v. *Parrino,* 212 F. 2d 919 (2 Cir.), cert. denied, 348 U. S. 840 (1954).

Under the circumstances of this case, appellant was entitled to seek *coram nobis* relief. *United States* v. *Morgan,* 202 F. 2d 67 (2 Cir. 1953), aff'd, 346 U. S. 502 (1954). But he would be entitled to an evidentiary hearing only if he raised a material issue of fact on a claim of constitutional dimensions. *United States* v. *Tribote,* 297 F. 2d 598, 600 (2 Cir. 1961). In reaching the decision from which appellant now appeals, Judge Wyatt had the benefit of a transcript of appellant's change of plea before Judge Cannella, appellant's moving affidavit, counter-affidavits filed by the government, and various exhibits including copies of correspondence between appellant's counsel and the government prior to appellant's change of plea. In his thorough opinion, Judge Wyatt properly relied upon these records and acted well within his discretion in denying the petition without a hearing. See *Accardi* v. *United States,* 379 F. 2d 312 (2 Cir. 1967); *Mirra* v. *United States,* 379 F. 2d 782 (2 Cir.), cert. denied, 389 U. S. 1022 (1967).

Judge Wyatt ruled that appellant's affidavit was insufficient to put the claim of coercion into issue. Nothing in Carlino's moving papers compels us to find otherwise. On this record, the allegations of an understanding that the charges against appellant's son would be dismissed did not, in itself, amount to a sufficient allegation of coercion. See *United States ex rel. Cunningham* v. *Follette,* —— F. 2d —— (2 Cir. 1968). In any event, even if the claimed understanding did exist, appellant neither misconstrued its terms nor misunderstood its immediate consequences. The understanding alleged was fully performed exactly as appellant expected. Its mere existence would in no way vitiate his otherwise knowing and voluntary plea. *Cortez* v. *United States,* 337 F. 2d 699 (9 Cir. 1964), cert. denied, 381 U. S. 953 (1965). See *United States ex rel. Rosa* v. *Follette,* —— F. 2d —— (2 Cir. 1968); *United States* v. *Cariola,* 323 F. 2d 180 (3 Cir. 1963).

Judgment affirmed.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

October 18, 1968

UNITED STATES OF AMERICA,

Appellee,

v.

LEO CARLINO,

Appellant.

On Petition for Rehearing

ELKAN ABRAMOWITZ, Asst. U. S. Atty., for Appellee.

JAMES E. BIRDSALL, New York City, for Appellant.

After the filing of our order appellant moved to include as part of the record on appeal a certain affidavit executed by Frank J. Carlino on November 5, 1963, to direct that the court hold a pre-hearing conference relative to disposition of the case after the affidavit shall have been entered in the record, and for a rehearing of the appeal on the enlarged record.

NOW, THEREFORE, the affidavit having been submitted to the court, IT IS ORDERED AND ADJUDGED that a copy thereof be included in the record on appeal, that the petition for rehearing is granted, and the fourth paragraph of the opinion filed on July 25, 1968 is amended to read as follows:

> "At the time of sentencing, the remaining counts of the indictment against appellant were dismissed. Subsequently, upon submission of an affidavit of innocence

by Frank Carlino, the government dismissed the case against appellant's son."

In all other respects the opinion is to remain unchanged and the petition denied.

STERRY R. WATERMAN

WILFRED FEINBERG
U. S. Circuit Judges

ROBERT C. ZAMPANO
U. S. District Judge

Order of Affirmance.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the Twenty-fifth day of July, one thousand nine hundred and sixty-eight.

Present: HON. STERRY R. WATERMAN,
HON. WILFRED FEINBERG,
Circuit Judges,
HON. ROBERT C. ZAMPANO,
District Judge.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MISS SMART FROCKS, INC., and HERMAN KLEIN,
Defendants,

LEO CARLINO,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

Entered—11/13/68.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1161

LEO CARLINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the district court (Pet. 17-25) denying the application for a writ of error *coram nobis* is reported at 279 F. Supp. 295. The opinion of the court of appeals (Pet. 26-29) is reported at 400 F. 2d 56.

JURISDICTION

The judgment of the court of appeals (Pet. 26-29) was entered on July 25, 1968, and a petition for re-

hearing was granted and the opinion modified on October 18, 1968 (Pet. 30-31). A motion to extend the time for filing a petition for a writ of certiorari was filed by petitioner on January 11, 1969, and on January 27, 1969, Mr. Justice Harlan extended the time to March 20, 1969. The petition was filed on March 15, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court properly denied without a hearing petitioner's application for a writ of error *coram nobis*.

STATEMENT

Petitioner instituted this action to set aside a judgment of conviction entered in December, 1963, on his plea of guilty to one count of a multi-count indictment.

In 1962 a 20-count indictment was filed in the United States District Court for the Southern District of New York charging petitioner and others with conspiring to evade income taxes and with various substantive offenses of income tax evasion. At the same time petitioner's son, Frank Carlino, and others were charged with tax evasion in a separate indictment. All defendants initially pleaded not guilty (R. 15a-17a, 22a-24a, 27a-42a).

Plea negotiations during the following year culminated in a representation by the government that upon petitioner's plea of guilty to one count of the indictment, the government would at the time of sentencing "make a determination with respect to the remaining

counts" against petitioner. In addition, the government agreed "to carefully consider" the case against petitioner's son, Frank Carlino, before proceeding to trial (Pet. 27). In November, 1963, petitioner, in the presence of his attorney, withdrew his plea of not guilty as to Count II and entered a plea of guilty to that count (R. 13a). Before accepting the plea of guilty the trial judge questioned petitioner about his plea (R. 48a-49a):

> By the Court:
>
> Q. All right, let's start all over again, Mr. Carlino; you want to plead guilty and you have entered such a plea, which I am not too sure I am going to take yet, but I want to find out what you know about it. You are pleading guilty to a charge which says that you violated the Internal Revenue Laws. It says here that on April 14 you filed a return which in effect was a false return for the calendar year 1955, and you filed a joint return at that time on behalf of yourself and your wife, and at that time you said that the taxable income for that year was $54,000 in round figures, and the tax due on that was $22,000, whereas the fact of the matter was that the income was about $70,000 and the tax was about $32,000.
>
> Did you file such a return? A. Yes, sir.
>
> Q. And you knew at the time that you were in effect understating your income by about $25,000? A. Yes.
>
> Q. You did know that? A. Yes, sir.
>
> Q. It was prepared by an accountant for you and then you signed it; is that it? A. Yes, sir.

Q. There is no question in your mind that you knew that this return was a false return when you filed it? A. No, sir.

Q. There is not? A. No, sir.

Petitioner also assured the judge on the record that no promises had been made to him by anyone (R. 49a).

Petitioner was fined $5,000 and sentenced to one year in prison. Petitioner has served his jail sentence and paid the fine. (R. 22a-23a; Pet. 27.)

In 1966, the Commissioner of Internal Revenue notified petitioner of an income tax deficiency and a fraud penalty for 1955, the year involved in the count to which he pleaded guilty. Although petitioner has filed a petition in the Tax Court seeking to contest the deficiency, he finds that the judgment of conviction collaterally estops him from contesting the fraud penalty for 1955. *Moore* v. *United States*, 360 F.2d 353 (C.A. 4), certiorari denied, 385 U.S. 1001. Thus, petitioner's stated motive for seeking a writ of error *coram nobis*—on the ground that his plea of guilty was involuntary—is to free him to contest in the Tax Court the fraud which he admitted by his guilty plea (R. 20a).

ARGUMENT

Petitioner's application for the writ of error *coram nobis* was supported only by his own affidavit in which he stated that his counsel told him that the United States Attorney had "indicated" (R. 17a) that if petitioner and the corporation entered guilty pleas to one count the remaining counts would be dismissed and the charges against petitioner's son would be dismissed.

Even accepting petitioner's allegation as true, there was no basis for invalidating the guilty plea. A mere indication that a subsequent course of action might be followed can hardly be considered as a prosecutorial promise which undermined the validity of the plea. Petitioner stated at arraignment that no promise had been made by anyone. In light of petitioner's unequivocal admission at the time he entered his guilty plea that he had wilfully endeavored to evade his taxes, the district judge was fully justified in rejecting his present claim that he was not guilty and only entered his plea to save his son.

Moreover, even if there was a promise, all the terms as stated by petitioner were carried out; the remaining counts against him, and all the charges against his son were dismissed. Assuming that petitioner pleaded guilty to save his son, that does not render the plea involuntary. "If a defendant elects to sacrifice himself for such motives, that is his choice, and he cannot reverse it after he is dissatisfied with his sentence, or with other subsequent developments." *Kent* v. *United States*, 272 F.2d 795, 798 (C.A. 1); *Cortez* v. *United States*, 337 F.2d 699, 700-702 (C.A. 9); cf. *United States ex rel. Cunningham* v. *Follette*, 397 F. 2d 143, 146 (C.A. 2).

There is no conflict between this case and *Johnson* v. *Wilson*, 371 F.2d 911 (C.A. 9), or *Shelton* v. *United States*, 356 U.S. 26. In *Johnson* a hearing was held to be required because the petition for a writ of habeas corpus sufficiently alleged that the plea of guilty was the product of a coerced confession and of evidence obtained by unlawful search and seizure, that the plea

was itself coerced, and that the defendant did not have the effective assistance of counsel before entering his plea. In *Shelton* the defendant, who was not represented by counsel, had been incarcerated for a long time prior to trial and a government prosecutor allegedly threatened him with an even longer period of pre-trial confinement than the one-year sentence which the prosecutor "guaranteed" would be imposed upon a guilty plea.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ERWIN N. GRISWOLD,
Solicitor General.

JOHNNIE M. WALTERS,
Assistant Attorney General.

JOSEPH M. HOWARD,
RICHARD B. BUHRMAN,
Attorneys.

APRIL 1969.

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